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Torts–Voluntary Assumption of Duty–Federal Tort Claims Act

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result. Instead of harsh, fixed rules of law the court looked to the facts and circumstances of the case to determine where the equities lay.

M. J. P.

TORTS—VOLUNTARY ASSUMPTION OF DUTY—FEDERAL TORT CLAIMS ACT.—Action by barge charterer and others, under the Federal Tort Claims Act, for damages sustained when a tug went aground and the cargo on a barge towed by it was damaged allegedly because of the negligent operation of a lighthouse by the coast guard. The coast guard personnel failed to check the equipment and to make the necessary repairs, and they failed to give warning that the light was not operating. *Held*, that the coast guard, having undertaken to provide lighthouse service, had a duty to use due care to make certain that the lighthouse was kept in good working order and to use due care to discover failure of the light, to repair the same, or to give warning that it was not functioning; and if the coast guard failed to do so and damages were thereby caused to the petitioners, the United States was liable under the Tort Claims Act. *Indian Towing Co. v. United States*, 76 Sup. Ct. 122 (1955) (5-4 decision).

The old common law maxim that the "king could do no wrong" has been disregarded in the United States. Here the sovereign can be sued, but not without consent. In 1946 the Federal Tort Claims Act was enacted. The relevant provisions are: ". . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss . . . caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346 (b) (1952). "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." *Id.* § 2674. Negligence was admitted in the principal case. The question was whether this was a type of negligence for which the government had consented to be sued.

In *Feres v. United States*, 340 U.S. 135 (1950), it was held that members of the armed services injured through the negligence

of other military personnel could not sue the United States under this statute because the plaintiffs could not point to any liability of a private individual even remotely analogous to that which they were asserting against the United States. No private individual has power to conscript a private army. The court admitted that some private liabilities might have a few similar characteristics, but held that the liability assumed by the government is that created by all the circumstances, not that which a few of the circumstances might create. Such a suit was not possible before the statute and the court held that the act was not intended to create new liabilities; it was intended only to waive immunity as to existing causes. Thus the court construed the statute strictly in favor of the government, holding that uniquely governmental activities created no liabilities for the negligence on the part of its employees.

In *Dalehite v. United States*, 346 U.S. 15 (1953), the government authorized the use of certain explosive materials in the manufacture of fertilizer which it then stored in a seaport awaiting shipment. As a result, violent explosions occurred when a fire was started in the port. The government was held not liable for the storage of the fertilizer under the "discretionary functions" exception in 28 U.S.C. § 2680 (a) (1952). However, the coast guard was found negligent in its fire fighting duties. The court again held that the government was not liable because no similar private liability existed. "... if anything is doctrinally sanctified in the law of torts, it is the immunity of communities and other public bodies for the injuries due to fighting fire."

Both of these cases seem to hold that there can be no governmental liability for the negligence of employees where the activity is uniquely governmental. By statute, 14 U.S.C. 81 (1952) the coast guard is given the power to maintain lighthouses, and by statute, *id.* § 83, this right is made exclusive. Thus the maintenance of lighthouses is made a uniquely governmental function. From this it follows that the government would not be liable for the negligent operation of the lighthouse in the principal case. However, the court seems to create an exception to the general rule. It says, "... it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner." The statute, 14 U.S.C. § 81 (1952), does not require the coast guard to maintain lighthouses; it merely provides that the coast guard "may" maintain navigation aids. Thus when the coast guard undertakes such an

activity, engendering reliance thereon, it has a duty to use reasonable care in the maintenance of the lighthouses or to warn the public that the lighthouses are no longer operating properly. The Court does not look to the specific activity; it merely looks to the fact that the government has undertaken something which it is not required to do. A private individual in similar circumstances would be liable if he did not use reasonable care. Thus the statute makes the government liable.

The statute, 28 U.S.C. § 2680 (1952), lists several exceptions to the statute granting consent for the government to be sued. The *Feres* and *Dalehite* cases add one more—the government does not consent to be sued for negligence in the performance of uniquely governmental activities. This exception is now limited by the decision in the principal case. The court distinguishes between unique activities which the government is required to undertake and those which it is not required to undertake. The statute establishes liability for negligence in the performance of the latter.

W. A. K.

WORKMEN'S COMPENSATION—MEANING AND EFFECT OF CASUAL EMPLOYER PROVISIO.—In an action to recover damages for injuries suffered while plaintiff was driving a truck belonging to the defendant, the circuit court rendered judgment for the plaintiff and the defendant prosecuted a writ of error. *Held*, on appeal, that where defendant, engaged in a business, although operating it intermittently, had employed plaintiff as a sawyer and truck driver for approximately two years, plaintiff working regularly six days a week and being paid at regular two week intervals, defendant was an employer within the workmen's compensation statute; and plaintiff's contributory negligence and assumption of risk were not available as defenses. *Walls v. McKinney*, 81 S.E.2d 901 (W. Va. 1954).

In the principal case, the court, at page 906, says, "The record in this case shows that the defendant was not a casual employer. . . ." This treatment of who is or is not a casual employer within the meaning of W. VA. CODE c. 23, art. 2, § 1 (Michie 1949), is probably of no importance in the principal case insofar as the result is concerned, because the defendant probably had more than three employees. However, it does raise, and leaves unanswered, some interesting questions concerning the definition of "casual employers"